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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
-VS-	)	Criminal No. 21-10104-PBS
	)	Pages 1 - 44
VLADISLAV KLYUSHIN,	)	
	)	
Defendant	)	

**HEARING IN PERSON**

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts 02210  
January 12, 2023, 9:14 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
leemarz@aol.com

1       A P P E A R A N C E S:

2               SETH B. KOSTO, ESQ. and STEPHEN E. FRANK, ESQ.,  
3       Assistant United States Attorneys, Office of the United States  
4       Attorney, 1 Courthouse Way, Room 9200, Boston, Massachusetts,  
5       02210, for the Plaintiff.

6               MAKSIM NEMTSEV, ESQ., 20 Park Plaza, Suite 1000,  
7       Boston, Massachusetts, 02116, for the Defendant.

8               MARC FERNICH, ESQ., Law Office of Marc Fernich,  
9       800 Third Avenue, Suite Floor 20, New York, New York, 10022,  
10       for the Defendant.

11       ALSO PRESENT: Alex Tetradze, Russian Interpreter  
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P R O C E E D I N G S

THE CLERK: Court calls Criminal Action 21-10104, United States v. Klyushin. Could counsel please identify themselves and the interpreter.

MR. FRANK: Good morning, your Honor. Stephen Frank and Seth Kosto for the United States.

MR. KOSTO: Good morning.

MR. NEMTSEV: Good morning, your Honor. Max Nemtsev and Marc Fernich on behalf of Mr. Klyushin.

09:15 10 THE COURT: Thank you.

(Interpreter Tetradze duly sworn.)

12 THE INTERPRETER: Alexander Tetradze, Russian  
13 interpreter.

14 THE COURT: Thank you very much. I know you both  
15 moved to continue this date, but we have so much to do that I  
16 thought we could accomplish certain things today, particularly  
17 with respect to the logistics of the hearing on the 18th. I  
18 did receive a brief yesterday afternoon from the government on  
19 the statistics. I thought today we could at least -- we were a  
09:15 20 bit rushed the last time because we had so many motions in  
21 limine to deal with, but I really thought we could spend some  
22 time today talking me through at least some of the issues; also  
23 talk about the trial date and how long it will take.

24 I noticed on the pretrial order that most of the stuff  
25 doesn't come in till January 23, but we haven't really talked

1 yet about what the voir dire would look like, and that's a  
2 little close up on it. So I did approve it and you all agreed  
3 on it, but I'm regretting it now, since there may be issues  
4 about how to do the voir dire, et cetera.

5 So let me just start off, I'm very interested in  
6 learning more about MaxMind, and who do you plan on bringing in  
7 to explain it better to me? I thought that little chart, if I  
8 can find it, was useful, but I need somebody to talk to me  
9 about that and the 66 percent number before it appears on the  
09:16 10 stand.

11 MR. KOSTO: Judge, we're going to propose a somewhat  
12 alternate way of getting at the information that does not rely  
13 on the MaxMind data, and, simply, we're pulling together the  
14 records; but the invoice trail and the contract trail we  
15 believe, under suitable authentication by the records  
16 custodians, will show that the owner of the IP address,  
17 Web2Objects, authorized the assignment of this --

18 THE COURT: Wait a minute. I'm trying to take notes  
19 because this is different than what we talked about before.

09:17 20 MR. KOSTO: Would it be helpful if I put the Exhibit A  
21 back up?

22 THE COURT: Yes. Web2Objects is the owner of the IP  
23 address.

24 MR. KOSTO: So, your Honor, I've put Exhibit A back  
25 up. At the top box on the left-hand corner is Web2Objects LLC.

1 They are assigned the IP address in question from the Internet  
2 registry in late May, 2018, about five months before the key  
3 dates with respect to the IP address in Boston.

4 THE COURT: Late May when?

5 MR. KOSTO: Late May of 2018. Web2Objects issued an  
6 authorization in late May of 2018 for the IP address to be  
7 published and used in Boston, so an authorization, permission  
8 for it to be used there.

9 StackPath, the next entity down, leased the IP address  
09:18 10 from Web2Objects and had a contract with Micfo to rent out a  
11 datacenter in Boston.

12 THE COURT: You're going to have someone from StackPath  
13 talk about that?

14 MR. KOSTO: We have the invoices from Micfo to  
15 StackPath. We also have the invoices from Markley to Micfo  
16 showing that the datacenter was leased, the IP address was  
17 leased, the IP address that was authorized to Boston was in  
18 fact assigned to Boston. And what we would suggest is that if,  
19 under the appropriate certifications, the Court admits these  
09:19 20 business records, we will have an adequate basis to satisfy our  
21 preponderance burden on venue, rather than digging into a  
22 gnarly issue of the MaxMind geolocation issue, because the  
23 business records themselves establish what happened here.

24 THE COURT: Well, that's your choice, and it certainly  
25 avoids what I viewed as what everybody is now talking about in

1 evidence, which is, what do you do with these computer  
2 programs? It avoids that issue.

3 MR. KOSTO: We have provided the --

4 THE COURT: But can I just go --

5 MR. KOSTO: Sure.

6 THE COURT: Does 1 Summer Street still host on all  
7 these servers?

8 MR. KOSTO: 1 Summer Street the government believes is  
9 still a datacenter. It's not hosting servers on behalf of  
09:20 10 Micfo at the direction of StackPath. That contract expired  
11 well after the events in this case. We have invoices through  
12 at least July --

13 THE COURT: But it's a datacenter. Someone has  
14 actually --

15 MR. KOSTO: It's a physical place, and there are --

16 THE COURT: Has someone like an agent seen it?

17 MR. KOSTO: We have pictures of the computers --

18 THE COURT: Pictures, okay.

19 MR. KOSTO: -- in the datacenter; in fact, one labeled  
09:20 20 with the same sticker that's on the invoice.

21 THE COURT: That will be in evidence?

22 MR. KOSTO: Under a certification, yes. Again, we  
23 don't see the need to bring in a records custodian to --

24 THE COURT: Well, I don't know. Normally I would a  
25 hundred percent agree with you, except for the fact that the

1 defense makes much about the fact that Micfo had its share of  
2 legal problems.

3 MR. KOSTO: These aren't Micfo's records, your Honor.  
4 These belong to --

5 THE COURT: This is what I want to understand, okay.

6 MR. KOSTO: The records that we --

7 THE COURT: So normally you would be straight out  
8 correct: It would be a pretty straightforward thing. What was  
9 Micfo prosecuted for?

09:21 10 MR. KOSTO: Micfo was prosecuted -- I've read the  
11 press release, your Honor, and Micfo was prosecuted for opening  
12 fake companies, shell companies, to convince the organization  
13 that controls the IP addresses to give it more IP addresses  
14 that it could then rent and sell under names of fake companies  
15 with fake employees, called "channel partners" in the documents  
16 about the case. What we believe here is that Micfo, as the  
17 invoices reflect, was acting as Micfo, and was issuing invoices  
18 in its own name. And ARIN, the company that assigned the IP  
19 addresses to Web2Objects at the top of that chart has a record  
09:22 20 from June of 2018 saying this IP address was going to be used  
21 at 1 Summer Street in Boston.

22 THE COURT: Whose record is that?

23 MR. KOSTO: ARIN, the Association of Internet  
24 Registries. At the very top of this chart, you could imagine  
25 another box --

1 THE COURT: So that's a business record that you --

2 MR. KOSTO: That would also be a business record that  
3 would show as of June of 2018, before any of these events,  
4 ARIN, not geolocation, ARIN had a record saying the IP address  
5 would be used at 1 Summer Street in Boston. So we believe that  
6 we can accomplish this chain of records without relying on  
7 Micfo evidence at all, Micfo records at all. So we would rely  
8 on Markley's records, a business in the ordinary course;  
9 StackPath's records, a business in the ordinary course;  
09:23 10 Web2Objects LLC records, a business in the ordinary course; and  
11 then the records of the ultimate assigner of the IP address,  
12 ARIN, which way back in June of 2018 has a record indicating  
13 that the IP address was to be used at 1 Summer Street, Boston,  
14 the very address of the datacenter where there's a picture of a  
15 computer with the same sticker that appears on the invoice.

16 THE COURT: All right, this is very helpful because I  
17 was not going to allow in MaxMind without someone validating  
18 the methodology. So I'm not expecting an answer from you right  
19 now because you haven't seen -- have they seen everything?

09:23 20 MR. KOSTO: We have produced all of these invoices.  
21 We have produced all of the certifications.

22 THE COURT: When? When?

23 MR. KOSTO: Starting in late December, as recently as  
24 Monday. As we get them, we're --

25 THE COURT: So this is going to shift in strategy with

1     respect to this. Are you prepared to respond now, or would you  
2     like to wait until next week?

3             MR. NEMTSEV: I think we can respond primarily right  
4     now, your Honor.

5             THE COURT: It does take the uncertainty about  
6     geolocation monitoring off the table.

7             MR. NEMTSEV: And I think, your Honor, if the  
8     government wants to prove venue based on these invoices and  
9     pictures --

09:24 10            THE COURT: Just a little louder.

11            MR. NEMTSEV: If the government wants to prove venue  
12     based on pictures and invoices, they can try that, but it  
13     doesn't mean that MaxMind is still admissible. At the last --

14            THE COURT: No, no, they're pulling it off the table,  
15     as I understand. They're not going to try and admit it.

16            MR. NEMTSEV: Oh, well, if they're not admitting --

17            THE COURT: They're going to do it all based on  
18     business records. It may or may not meet their burden. Maybe  
19     you have things to contradict it; like, you have your own  
09:25 20     geolocation. Are you putting on anything having to do with  
21     your geolocation?

22            MR. NEMTSEV: I don't intend to.

23            THE COURT: Okay, so that issue is off the table, and  
24     it will be primarily a business records test that I don't need  
25     a *Daubert* hearing on, as far as I'm concerned, so --

1 MR. KOSTO: So long as, your Honor, the defense is not  
2 contesting the authenticity or, frankly, admissibility of the  
3 business records themselves, in the ordinary course, we would  
4 say, "Judge, we're going to offer these records under the  
5 certification --"

6 THE COURT: They have the right to object.

7 MR. KOSTO: And we would ask the Court to evaluate the  
8 certification and admit the document as authentic.

9 THE COURT: I don't think I've seen them yet, but it  
09:25 10 seems far more straightforward than relying on a geolocation  
11 device, which may be mere puffery, but they claim they're  
12 correct 66 percent of the time on their website. How do we  
13 know? I mean, it's just, like --

14 MR. KOSTO: But for purposes of managing the length of  
15 the trial and the number of witnesses, understanding if there's  
16 some small risk that we would have to fly a custodian from  
17 Seattle, Washington, to spend five minutes on the stand saying,  
18 "These are the records of our business --"

19 THE COURT: I don't know. Why don't you talk. That's  
09:26 20 why I'm doing this today rather than waiting till the 18th.  
21 Why don't you talk.

22 MR. KOSTO: Thank you.

23 THE COURT: Okay? So that seems just, like, a more  
24 traditional, straightforward way of handling the venue issue.  
25 Especially if you have the registry giving you an address in

1 Boston, it seems that that would be certainly admissible. And,  
2 I don't know, unless they have reason to believe that these  
3 particular documents are the kind of documents that were  
4 subject to the fraud, it seems on a preponderance standard to  
5 at least be an alternative way of proving this.

6 Okay, so next issue.

7 MR. KOSTO: Thank you, your Honor.

8 THE COURT: Thank you. That's very helpful. And the  
9 second issue is statistics. Is Mr. Clarke coming next week?

09:27 10 MR. FRANK: He can, your Honor. He's in Washington.

11 THE COURT: All right, now, here's the question: Is  
12 your expert coming next week?

13 MR. NEMTSEV: Yes, he is. He's available, your Honor.

14 THE COURT: So can I just start from a threshold  
15 issue. Who is Mr. Clarke?

16 MR. FRANK: Mr. Clarke is a financial economist at the  
17 SEC where he's worked for a number of years. Prior to that, he  
18 was in the private sector.

19 THE COURT: Does he have training in statistics?

09:27 20 MR. FRANK: Absolutely, your Honor.

21 THE COURT: I didn't have a bio.

22 MR. FRANK: Oh, I'm sorry. That's on his resume, but  
23 he's extensively trained in statistics.

24 THE COURT: I want to know that because all I saw when  
25 I Googled him -- I love Google -- all I saw is he's a financial

1 economist. So he likely has the expertise to talk about the  
2 markets, et cetera, but I didn't know whether he had enough  
3 to -- I'm going to go to you in a minute -- with the guy who  
4 graduated in 2019.

5 MR. FRANK: He testified in February before Judge Young  
6 as a statistical expert.

7 THE COURT: Your guy, Clarke. Okay, that's useful to  
8 know. See, I knew nothing about him. *Daubert* applies equally  
9 to criminal and civil, and I have to make findings about his  
09:28 10 qualifications as well as the methodology, as well as the  
11 reliability of the data underpinning the methodology. It's  
12 just, I know you all don't do that much of it, but I do it a  
13 lot in civil, especially patent and product liability cases.

14 All right, so you're saying that he -- what is his  
15 extensive training in statistics? Does he have a Ph.D. in  
16 economics?

17 MR. FRANK: He does not have a Ph.D. I actually don't  
18 have his resume right in front of me. Do you have it?

19 THE COURT: Does he have specific training in  
09:28 20 statistics, rather than someone like me who had an undergraduate  
21 course?

22 MR. FRANK: Yes, your Honor.

23 THE COURT: All right, so he has training --

24 MR. FRANK: Or someone like me who got a B plus.

25 THE COURT: What?

1 MR. FRANK: I got a B plus in statistics, but --

2 THE COURT: I'm not putting you on the stand.

3 MR. FRANK: No, I should not --

4 MR. FERNICH: That's more than I have. All of it is  
5 more than I have, so you're ahead of me.

6 THE COURT: I find statistics difficult, just saying.

7 MR. FRANK: Yes, and I understand that, your Honor.

8 And I think part of what we were trying to do in our brief,  
9 perhaps unsuccessfully, but make clear that this is not super-  
09:29 10 complicated statistics. It may seem that way to us, but this  
11 is a --

12 THE COURT: It will for sure seem that way to a jury.

13 MR. FRANK: It's a very established test from decades  
14 ago.

15 THE COURT: Now, who's going to say that?

16 MR. FRANK: He can say that.

17 THE COURT: That's what I want to hear. It's a  
18 *Daubert* hearing. I need, first of all, that he has  
19 qualifications in statistics. I didn't get this kind of a  
09:29 20 report. I think he dealt with the test in the last paragraph  
21 of the brief you filed yesterday, but why it applies here, and  
22 why the dataset is reliable. They can attack it if they want,  
23 and they're going to, but I just want to at least make sure  
24 that I've got a valid technology because the figure that I'm  
25 worried about is the one in a trillion, and I want to know

1 mathematically how he got there.

2 MR. FRANK: Right. So what I would say, your Honor,  
3 is he did this test using different tests.

4 THE COURT: I saw that. The other two I had no idea  
5 what they were.

6 MR. FRANK: Right, but they all lead to the same  
7 result, which is, there is an extraordinary -- whether it's one  
8 in a trillion or whether he says it's highly statistically  
9 significant, it's well past the traditional threshold.

09:30 10 THE COURT: I would prefer the highly "statistically  
11 significant" because I think under any theory that might be  
12 true; but if it's "one in a trillion," I need to know how he  
13 gets there and what the other two tests show. And you said I  
14 could give a limiting instruction, but I wasn't quite sure how  
15 to give it.

16 MR. FRANK: We could craft something, but what we were  
17 envisioning was something along the lines -- I cited a case  
18 involving DNA evidence, that the statistics can be used for the  
19 purpose of showing the correlation between these two things.

09:31 20 In other words, the fact that --

21 THE COURT: But it doesn't mean he did it?

22 MR. FRANK: Correct.

23 THE COURT: That's the gist of what you think it is?

24 MR. FRANK: That's the gist. We have other evidence  
25 that he did it.

1 THE COURT: It could be the other names, Ermakov, or  
2 it could be the two who are unnamed coconspirators and that  
3 sort of thing, so --

4 MR. FRANK: Well, yeah, the statistics doesn't show  
5 why the trading is correlated. The statistics doesn't show  
6 who's sitting behind the computer. It can't be used for any of  
7 those purposes.

8 THE COURT: All right, so why don't you craft  
9 something on that, but I also just want to understand the math  
09:31 10 before that kind of a number. That's what typically happens in  
11 DNA. You looked at me like a deer in headlights when I  
12 mentioned DNA, but it's a similar kind of problem actually.

13 MR. FRANK: It is, and the reason I cited that DNA  
14 case is because they actually did testify in that case to one  
15 in a trillion and -- and --

16 THE COURT: But they also in the Manual For Scientific  
17 Evidence, reference manual, warn judges to be careful about it  
18 and how it's worded. And so I just want to be very careful on  
19 that subject. But mostly I just want to understand the math.  
09:32 20 I just want to make sure that there's a valid methodology and  
21 that the dataset he's relied on is reliable. I think defense  
22 challenged the dataset a bit in terms of what transactions  
23 should be counted and that sort of thing. So I will see  
24 Mr. Clarke, and he will take the stand and help me.

25 Now, let me just say, I'm not thinking of a

1 full-blown -- this isn't like him on the stand, and you may not  
2 want to disclose your cards for cross. I just need to have  
3 enough of a predicate to allow him to testify.

4 Now, you are planning on putting on your witnesses, a  
5 rebuttal? Is that it at this point?

6 MR. NEMTSEV: Yes, your Honor.

7 THE COURT: Or are you saving your fire for trial?

8 MR. NEMTSEV: No, your Honor. We plan to put him on  
9 as a rebuttal witness. He could listen to Mr. Clarke's  
09:33 10 testimony --

11 THE COURT: Yes, of course he can.

12 MR. NEMTSEV: -- and if he has opinions or --

13 THE COURT: Okay, now, here are credentials. He  
14 graduated in 2019, so he's a kid.

15 MR. NEMTSEV: He graduated with a master's in 2019.

16 THE COURT: Yes, I know, so I want to understand. I'm  
17 just saying, has he ever testified before?

18 MR. NEMTSEV: He has never testified. He has  
19 publications related to --

09:33 20 THE COURT: No publications --

21 MR. NEMTSEV: No, he has publications.

22 THE COURT: Like, I don't have those. Typically I get  
23 that stuff. Has he published in this area about this test?

24 MR. NEMTSEV: He has, your Honor, in areas related to  
25 statistics very similar to this, and the publications are

1 listed on his resume` at the bottom.

2 THE COURT: Okay. Well, maybe --

3 MR. NEMTSEV: And I could provide the publications if  
4 your Honor wishes to see them.

5 THE COURT: And they should probably have it too, the  
6 list of publications.

7 Does your person have publications?

8 MR. FRANK: I don't think so, your Honor.

9 THE COURT: And you only had in your opposition lawyer  
09:34 10 argument basically, so it will be important for me to hear your  
11 expert argument. Assuming for a minute he has a master's in  
12 statistics and he's familiar with these tests that were cited  
13 by Mr. Clarke, he's likely qualified to talk about the  
14 methodology, but I think the primary thrust of what you were  
15 saying is that, one, the methodology is inappropriate for this  
16 kind of a large data pool. Isn't that it?

17 MR. NEMTSEV: It is.

18 THE COURT: And, second, that the dataset was under-  
19 inclusive? Was that it?

09:34 20 MR. NEMTSEV: It didn't account for any other variable  
21 except whether FA-1 or FA-2, so meaning all of Mr. Klyushin's  
22 trades are also in large-cap, highly liquid companies with big  
23 market caps, you know, and it would correlate to one in a  
24 trillion chance.

25 THE COURT: I mean people who aren't charged at all in

1 this.

2 MR. FRANK: That's not -- I don't think that's what  
3 they're arguing, Judge. I think --

4 THE COURT: Are you arguing -- say it again.

5 MR. NEMTSEV: We're arguing the fact that in order for  
6 Mr. Clarke to get to his results, the first assumption that he  
7 has to make -- and that's the null hypothesis that he's --  
8 testing -- is whether or not his trading is by chance or  
9 whether or not it correlates to Filing Agent 1 and 2.

09:35 10 THE COURT: Yes, that's true.

11 MR. NEMTSEV: But he excludes -- it's not like DNA  
12 where you take every chromosome and match it up. He excludes  
13 all the other variables. He, for example, doesn't take into  
14 consideration, are these tech stocks, bank stocks? Are these  
15 liquid stocks? Are these large-cap stocks, large  
16 capitalization stocks?

17 THE COURT: Can I say, that's fair, but why would that  
18 matter, in terms of him trading on the inside information,  
19 whether it's large cap or small cap? He's also just trading  
09:35 20 right before the insider.

21 MR. NEMTSEV: Because, your Honor, the correlation  
22 that they're trying to argue and put together to the jury, it's  
23 very easily confused for causation --

24 THE COURT: I keep losing you. We're going to have  
25 this problem because the Interpreter is speaking behind you,

1 and you're a bit soft-spoken, just saying.

2 MR. NEMTSEV: I can speak louder. Or I could sit  
3 down. Would that help?

4 THE COURT: That's fine. I have this problem a lot  
5 with tall lawyers.

6 MR. NEMTSEV: I'm not even that tall, your Honor.

7 THE COURT: So much better right now.

8 MR. NEMTSEV: The issue is that the correlation that  
9 they're trying to put in, this one in a trillion correlation,  
09:36 10 it's easily confused for causation. And it's even easier to  
11 confuse it for causation when you don't consider any other  
12 variable that could have correlated the trading to as well.  
13 You know, that's the difficult part.

14 THE COURT: So are you saying the FA-1 and FA-2 tend  
15 to trade in a certain kind of stock?

16 MR. NEMTSEV: They do, your Honor. We cite it in our  
17 statistics. They make up the majority of all the S&P 500  
18 stocks and all the NASDAQ stocks.

19 THE COURT: That's a lot of stocks.

09:37 20 MR. NEMTSEV: That's a lot of stocks. That's most of  
21 the stock market.

22 THE COURT: So if he's trading, after they get the  
23 earnings reports but before it goes public, in the S&P 500 and  
24 the NASDAQ, I mean, why isn't that an important correlation?

25 MR. NEMTSEV: It's a correlation, but it's a

1 correlation that thousands of other traders who trade on  
2 earnings would make.

3 THE COURT: I know, but they don't know the earnings  
4 yet.

5 MR. NEMTSEV: I'm sorry?

6 THE COURT: At least as alleged, the earnings haven't  
7 become public yet, the earnings report.

8 MR. NEMTSEV: Yes, but many traders -- our financial  
9 expert who is expected to testify that it's a common trading  
09:37 10 strategy.

11 THE COURT: To what?

12 MR. NEMTSEV: To purchase a stock right before  
13 earnings, believing that the earnings report is going to be  
14 positive, and to sell it after earnings. It's a common trading  
15 mechanism, trading strategy used by traders, companies, banks.

16 THE COURT: That's a good defense for you, but it  
17 doesn't undermine his philosophy, which is, no, they traded  
18 immediately after the earnings came out.

19 MR. NEMTSEV: Their philosophy is, he traded before  
09:38 20 the earnings and then sold or closed the position after the  
21 earnings, which is consistent with how all the other major  
22 banks do it and other traders that trade on earnings.

23 THE COURT: I just haven't --

24 MR. FRANK: So if I could just briefly respond to the  
25 that, Judge.

1 THE COURT: Well, let me put it this way: I'm going  
2 to hear from these experts, so, I mean, I'm not ruling  
3 definitively at this point. I, at the very least, would do a  
4 limiting instruction, but also I have to own the math.

5 MR. FRANK: These issues that they're raising right  
6 now are not *Daubert* issues. These are cross issues, these are  
7 rebuttal issues, but they're not *Daubert* issues. The only  
8 thing, and the reason the limiting instruction, you know, that  
9 we would welcome a limiting instruction is precisely the point  
09:39 10 that Mr. Nemtsev is making, which is, he's not testifying as to  
11 causation. He's not saying X caused Y. He's just simply  
12 saying the relationship between X and Y is highly correlated.  
13 And so his null hypothesis, the thing he was testing, is that  
14 there should be no relationship between a company's choice of  
15 filing agent, which is, as your Honor pointed out last time,  
16 just a ministerial function.

17 THE COURT: By the way, are the filing agents located  
18 here in Boston?

19 MR. FRANK: The filing agents are not located here in  
09:39 20 Boston.

21 THE COURT: Are they testifying at all?

22 MR. FRANK: They will be testifying.

23 THE COURT: On the hack, so we'll have information  
24 about the kinds of stocks they have and that sort of thing?

25 MR. FRANK: Yes. So what his analysis shows is, he

1 trades 96, 98 percent of the time in the earnings of companies  
2 that for those particular earnings reports used these two  
3 filing agents. And that relationship, given that they only  
4 filed 44 percent of all earnings reports -- he looked at every  
5 single earnings report that was filed in the year and a half,  
6 in the time period, in the time period of the charged  
7 conspiracy. He looked at each one. They filed 44 percent of  
8 them. But the defendant and his coconspirators traded  
9 98 percent of the time when they traded earnings in those  
09:40 10 particular reports. That relationship --

11 THE COURT: I'm less worried about that than  
12 understanding whether the methodology applies in a reliable way  
13 and whether or not --

14 MR. FRANK: Yes, and all they're saying on that front  
15 is, he didn't consider other variables that could affect that.  
16 But that's not a *Daubert* issue. That's a "there are other  
17 things that could be causing that" issue, and they're welcome  
18 to testify to that. He's not going to testify what caused it.  
19 All he's going to say is: These numbers add up in this way,  
09:41 20 and there's a statistically significant relationship between  
21 them. Otherwise, you'd expect he'd only trade, you know,  
22 roughly around 44 percent of the time in those stocks.

23 THE COURT: Well, listen, I'm not going to have it all  
24 argued now. I would like to have you -- you will put your  
25 expert on because I really, I'm just learning about it now, his

1 credentials -- and that's helpful that he testified in front of  
2 Judge Young as an expert -- and whether he's familiar with this  
3 methodology and any articles he's written. It sounds like he  
4 hasn't written any. Or any other times he's testified, let  
5 them know.

6 And similarly with you, a full resume` of the --

7 MR. NEMTSEV: It's on the docket, your Honor. His CV  
8 is on the docket.

9 THE COURT: I did see some of it. That's how I know  
09:42 10 he has a master's from Arizona --

11 MR. NEMTSEV: Yeah, I'll ask him to expand --

12 THE COURT: -- in 2019, so he may not have ever  
13 testified before.

14 MR. NEMTSEV: He has not testified, your Honor.

15 THE COURT: Okay. And I imagine one key part of it  
16 is, at least what you said, this is an unreliable methodology  
17 for this problem. Is that not what he's sticking with?

18 MR. NEMTSEV: No, he is, your Honor. He's going to  
19 say that the Fisher's Exact Test, he's going to describe what  
09:42 20 it is, explain why it's not a useful test under these  
21 circumstances for the facts of this case.

22 THE COURT: So that's primarily what I'm worried  
23 about, and I'm unlikely to be able to write a full opinion.  
24 Let's just say that. It's coming way up. I should warn you  
25 that I am out of town in Miami on January 26 and 27. I'm

1 speaking at a conference on multidistrict litigation, and so  
2 unfortunately -- so the 18th is going to be a big date for me.

3 I'm allowing the 18th, I'm sorry, as an alternative  
4 date for the *Daubert* hearing. Today is like a logistics thing,  
5 okay.

6 So as far as I can tell right now, we're just having  
7 two witnesses, is this correct, because the MaxMind has gone  
8 away? And so that's good. That's narrow.

9 So the other things I would like to be able to discuss  
09:43 10 with you on the 18th is exactly how long this trial is going to  
11 be, assuming for many days -- maybe you have some personal  
12 commitments with kids or doctors' appointments that you made,  
13 but basically I'm thinking of going 9:00 to 4:00.

14 MR. FRANK: If I could just address that, we've been  
15 speaking about that, your Honor. So we've done a pretty  
16 conservative analysis of our direct case, and we think that  
17 with equal time for the defense on cross-examination --

18 THE COURT: That's a rough rule of thumb.

19 MR. FRANK: And actually, in speaking with the  
09:44 20 defense, I actually think it's a pretty conservative rule of  
21 thumb in this case because so much of the case is law  
22 enforcement agents testifying about records. So we think our  
23 case conservatively -- we assumed half days -- would be six  
24 half days, and their case conservatively is one to two half  
25 days.

1 THE COURT: Eight days?

2 MR. FRANK: Eight half days plus a day for jury  
3 selection.

4 THE COURT: Right. What about openings and closings?  
5 What about time for deliberations?

6 MR. FRANK: Right, but we think -- so what we're  
7 saying, that's still under two weeks. We have three weeks  
8 before school vacation week, which is something we had not  
9 realized.

09:44 10 THE COURT: You're not hearing. If you're six half  
11 days and they're two half days, that's eight half days.

12 MR. FRANK: That's eight half days, right.

13 THE COURT: You add a half day for jury impanelment  
14 and openings, let's say. You have a half day for jury  
15 instructions and closings.

16 MR. FRANK: That's ten.

17 THE COURT: That's two weeks, right?

18 MR. FRANK: Correct.

19 THE COURT: You assume two or three days for jury  
09:45 20 deliberations, and then you have to build in Murphy's law,  
21 which is a snowstorm, not that we've seen any snow at all.  
22 It's like snow has disappeared, but --

23 MR. FRANK: But that's why we think we have a cushion  
24 with the three weeks that we have, and our suggestion would be  
25 to start with half days, and then, if we need to, to go to full

1 days rather than --

2 THE COURT: I'm happy to consider that if you're all  
3 convinced that that will work. It's easier on lawyers, I know  
4 that. It's actually easier on us because we have all this  
5 stuff in the afternoon. But what I don't want to do is back  
6 into that school vacation week because I'll lose jurors.

7 MR. FRANK: If we are three or four days in and it's  
8 going slower than we expect, we're both comfortable extending  
9 it.

09:46 10 THE COURT: Okay, you want that too?

11 MR. NEMTSEV: Yes. I think we could do it in a  
12 shorter time span than is currently estimated.

13 THE COURT: So assuming a two- to three-week trial,  
14 things to think about -- you don't have to answer me right now,  
15 but it may make a difference how we do the jury pool -- do you  
16 want vaccinated jurors?

17 MR. FRANK: Yes.

18 THE COURT: What about you all? Have you thought  
19 through that issue? You can let me know. Are you all  
09:46 20 vaccinated? Mr. Klyushin, did he get a vaccine?

21 MR. NEMTSEV: Yes, he is, but we prefer a diverse jury  
22 pool, your Honor, both vaccinated and unvaccinated.

23 THE COURT: Right, if you object, I won't do it. But  
24 what I will do is -- it does add a level of complexity -- I  
25 will tell people that -- I think we find out that information,

1 by the way. We'll ask that information. And if people want  
2 to, I'll inform them that there's someone unvaccinated, and  
3 they can wear masks if they want. So it's just a little more  
4 complicated, but that's fine.

5 I'm thinking I will have a problem with respect to the  
6 fact that Mr. Klyushin is a Russian national, and I was trying  
7 to figure out how to deal with that to make sure it's a fair  
8 and impartial jury pool. And one thought that I sometimes --  
9 I'm not a big fan of lengthy questionnaires, written  
09:47 10 questionnaires -- the way I do it typically all orally; but  
11 then occasionally, when I think there's a particularly  
12 sensitive issue, I might do a written questionnaire just on  
13 that so someone can say it additionally if they're embarrassed  
14 to say it in front of him, especially with what's going on  
15 internationally right now. We will never mention Putin.  
16 Mr. Putin is not going to be mentioned or anything having to do  
17 with what's going on right now. But I do think that I should  
18 at least -- I'm thinking -- there may be another question but  
19 at least one question in writing confidentially, "Do you think  
09:48 20 you can be fair and impartial given the fact that you will hear  
21 that Mr. Klyushin is a citizen of Russia?"

22 MR. FRANK: Judge, I would respectfully suggest that  
23 putting one question on that issue in front of the jury  
24 elevates that issue over everything else, and really makes it a  
25 focal point of the jury that we would be very uncomfortable

1 with.

2 THE COURT: I'm floating it. I've done it before with  
3 race, for example.

4 MR. FRANK: We have no objection to, you know, a  
5 question or incorporating that into a question the Court would  
6 ordinarily ask, and giving jurors who have any discomfort with  
7 issues of --

8 THE COURT: Well, I could word it differently. I  
9 could ask the question early and then say, "Is there anything  
09:48 10 about this case that makes you unable to serve fairly and  
11 impartially?" I'm willing to do that. I just find that when I  
12 do this on race, and I also do it sometimes on people who have  
13 unfortunately had sexual experiences in child porn cases, that  
14 people are embarrassed to raise their hand, so --

15 MR. FRANK: Sure, and we think people can come to  
16 sidebar for that. I just think putting a single question about  
17 that issue --

18 THE COURT: I'm going to address that next week. I'm  
19 floating some of these big issues. I'm thinking of getting a  
09:49 20 fairly large pool for impanelling because fourteen is standard;  
21 the question is whether I should get sixteen.

22 MR. FERNICH: Judge, this is sort of, as I think your  
23 Honor has recognized, this is sort of sui generis. I mean,  
24 we're in the middle of a massive war, and it strains credulity  
25 to think that with news reports, you know, every day an

1 avalanche of press about this, in this climate, it's vital to  
2 his right to a fair trial to be able to ferret out --

3 THE COURT: I want you to think about it. I'm going  
4 to resolve it on the 18th on how to do it. I am worried about  
5 it, given what's going on in Ukraine, and not to mention  
6 nationally, and what happened with the 2016 election, and on  
7 and on, and I just want to make sure. Anybody who's going to  
8 Google his name is certainly going to Google Ermakov's name --

9 MR. FERNICH: You've got it.

09:50 10 THE COURT: -- is going to see stuff, so I've got to  
11 make sure I --

12 MR. FRANK: If they're Googling, we have a bigger  
13 issue.

14 THE COURT: What?

15 MR. FRANK: If they're Googling, we have a different  
16 issue.

17 THE COURT: That's right, we have a big issue, and I  
18 don't want to be there. Too many trials are faltering on the  
19 issue of people finding out about -- in Varsity Blues it's  
09:50 20 happened. In Tsarnaev it happened. I mean, it just --

21 MR. FRANK: No, it didn't happen in Varsity Blues that  
22 people were Googling.

23 THE COURT: In my case, there was a concern about  
24 people who knew about it through social media. Let's put it  
25 that way.

1 MR. FRANK: Sure. So this case has got -- I mean, I  
2 did those cases -- this case has gotten a lot less attention in  
3 the Boston press than those cases.

4 THE COURT: I agree. I agree.

5 MR. FRANK: And we just think singling out that issue  
6 for special treatment is extraordinarily prejudicial and --

7 THE COURT: Well, help me think it through because I  
8 do think that there are a fair number of people concerned about  
9 the war in Ukraine and other issues having to do with Russia,  
09:51 10 and I want to make sure I have a fair jury of people who say  
11 they can put that aside. I'm not quite sure how to do it.  
12 That's why I'm flagging this issue so you all can talk about  
13 what you want.

14 MR. FRANK: Sure. There's going to be no suggestion  
15 that this defendant has anything to do with the war in Ukraine  
16 and the conduct of --

17 THE COURT: Well, except you --

18 MR. FRANK: The only issue is that he's Russian, and  
19 we have no objection to --

09:51 20 THE COURT: No, no, I certainly understand that you  
21 won't do it. I'm just saying people link it, or might link it.

22 MR. FERNICH: Judge, if you don't mind, now that we're  
23 here, could I just circle back to the Clarke issue for just a  
24 second and put the *Daubert* concerns to one side and talk about  
25 it on legal grounds for just a second, more conventional legal

1 grounds? And I think your Honor has hit upon the primary  
2 problem with this testimony, and it's an apt analogy to the DNA  
3 cases. And we don't see that many DNA cases in Federal Court,  
4 but I see them a lot in State Court in New York because they're  
5 gun cases. And when the feds in New York federalize a gun  
6 case, the DNA methodologies that are used in State Court get  
7 litigated in Federal Court. And I have some experience with it  
8 because I did an extensive appeal on one of these from Buffalo,  
9 and your Honor has hit upon it: Once the jury hears the  
09:52 10 number, one in a trillion -- whether it's methodologically  
11 reliable under *Daubert* or not is a question we're going to  
12 thrash out -- but the sheer intrinsic prejudicial nature -- and  
13 they'll say it's highly probative, and that will depend on  
14 *Daubert* -- but the prejudicial nature of that number is out of  
15 control, and the case is functionally over once they hear that  
16 because your Honor said it: This is very complicated material.  
17 Lawyers can't understand it. Statisticians can't agree upon  
18 it. And a juror is going to hear that number; they're not  
19 going to draw the fine distinctions between correlation and  
09:53 20 causation, and that number is mind-boggling. And there is a  
21 way to do it, and your Honor intimated it, and as did the  
22 government in other portions of their memoranda, where that  
23 number is taken out of it. You can use words, and they use it  
24 in their brief, "overwhelming bulk, exceedingly unlikely,  
25 substantially probable." There are ways to do this to convey

1 the same --

2 THE COURT: I'm open to those suggestions. It's a  
3 serious issue.

4 MR. FERNICH: Just one more thing.

5 THE COURT: I'm going to have the *Daubert* hearing next  
6 week. I'm not definitively ruling on it. I am just -- I mean,  
7 it is an important part of the case for them to --

8 MR. FERNICH: I understand.

9 THE COURT: I mean, their case, they don't have what I  
09:53 10 often have in cases, like a cooperating --

11 MR. FERNICH: It's a circumstantial case.

12 THE COURT: -- or a wiretap transcript. This is all  
13 about forensics, statistics, forensics. You have a few little,  
14 what's it, WhatsApp conversations?

15 MR. FERNICH: Yes.

16 THE COURT: But not what they often have, you know,  
17 where you say, "Why did this go to trial?" You know, the  
18 guy's, you know, you've got a picture of him selling the drugs.  
19 It's not that kind of case. Statistics is an important part of  
09:54 20 their case, and it's just a question if it's reliable -- and  
21 Mr. Clarke says it's reliable and he's qualified -- and, as I  
22 say, I Wikipedia'd it, it's a standard methodology -- then I'm  
23 likely to allow in his testimony; and the question of how he  
24 says it we'll talk about next week.

25 MR. FERNICH: And one more thing. Just on the

1 limiting instruction, we all know that they're presumed  
2 accurate and jurors are presumed to follow them. I don't  
3 quarrel with that proposition. But we also know from the  
4 *Bruton* context that they're not considered effective when  
5 jurors are asked to perform impossible feats of mental  
6 gymnastics, and this is tough material, and angels dancing on  
7 the head of a pin with respect to what these numbers mean. One  
8 in a trillion? That's a mind-boggling --

9 THE COURT: What is your expert going to say it is?

09:55 10 MR. FERNICH: I'll let my colleague, because he  
11 understands it better than I do, speak to that.

12 THE COURT: What's he going to say?

13 MR. NEMTSEV: He's not going to say that he redid the  
14 analysis and got a different figure. He's going to say that  
15 the P-value, whatever they're using, that's not a percentage  
16 for chance. That's just a percentage to indicate whether  
17 there's a strong relationship or not.

18 MR. FRANK: There's no dispute about that. We're not  
19 suggesting anything other than that. That's why I'm saying  
09:55 20 it's not grounds for a Daubert hearing because there is  
21 literally no dispute on that issue. He is not going to get up  
22 there and testify whether or not this happened by chance. He  
23 is simply going to say that there is a very strong one in a  
24 trillion statistical correlation between these two things. And  
25 the fact that it's one in a trillion they're not disputing,

1 because they haven't redone the analysis, that that's accurate,  
2 and, you know --

3 THE COURT: They're not coming up with a different  
4 number.

5 MR. FRANK: They're not, and, you know, we have to be  
6 able to put in our evidence because that's --

7 THE COURT: Right, but I also have to make 403 as to  
8 how they say it --

9 MR. FRANK: Understood.

09:56 10 THE COURT: -- you know, "statistically significant,  
11 overwhelmingly unlikely," whatever words. "One in a trillion"  
12 has a different meaning.

13 MR. FRANK: Right, and there are cases where that has  
14 come in, but I understand your Honor's point on that. But my  
15 point is that this red herring about whether or not it happened  
16 by chance is --

17 THE COURT: I don't think they're pressing it right  
18 now.

19 MR. FERNICH: Well, we are, and here is why. I mean,  
09:56 20 the way they've phrased it in the papers, saying it happened by  
21 chance, we're just reflecting back what was in the last proffer.

22 THE COURT: The flip of a coin.

23 MR. FERNICH: Well, that and also chance. I mean,  
24 chance is problematic, in my view, because exactly what we  
25 said: When you're playing the stock market, if you have no

1 idea what you're doing -- and I don't -- I'd be throwing darts,  
2 you know, pinning the tail on the donkey. But people do this.  
3 They study, they learn, and they try to lawfully gain the  
4 market. So chance isn't a good comparator, but now they're  
5 saying, in the absence of a relationship, that's a less-  
6 confusing way to put it.

7 I mean, a lot of this stuff, assuming it gets past  
8 *Daubert*, is going to come down to discretionary 403  
9 determinations. And my friend is right: This stuff does come  
09:57 10 in in the DNA context, and the DNA stuff is constantly evolving.  
11 We have this thing in New York now called Starmix, S-t-a-r-m-i-x.  
12 I did a whole appeal on it, and, yes, sometimes the numbers  
13 come in, other judges criticize it, and you get eye-popping  
14 wind shears like this. And whether the Second Circuit throws  
15 up its hands at what I write or not, it's tough for a defendant  
16 to get a fair trial under that circumstance before lay jurors  
17 who are not versed in this stuff; and irrespective of how in  
18 what lay terms the experts try to put it, they're not going to  
19 get this in a one-day trial.

09:58 20 THE COURT: Well, come up with an alternative. If it  
21 passes *Daubert*, then something is coming in.

22 MR. FERNICH: Yes.

23 THE COURT: And based on what I'm hearing today, that  
24 seems more likely. I have a better sense of things. But if it  
25 doesn't pass *Daubert*, the issue is over. If it does pass

1 Daubert, then I need to think about either cautionary  
2 instructions or just another way of saying it other than "one  
3 in a trillion," and I just have to think about that.

4 MR. FERNICH: Right, and there are three, I guess --  
5 and the government's papers are very helpful in this respect,  
6 they really drill down into the three different kinds of ratios  
7 or different types of ratios they're going to offer; and we're  
8 saying, you know, number one, I get conceptually that the  
9 choice of filing agent really doesn't have much to do on its  
09:58 10 face with a legitimate or illegitimate informational advantage.  
11 But, number two --

12 THE COURT: It's immaterial. It's like a --

13 MR. FERNICH: Right. But on Page 8, for example, in  
14 the Footnote No. 1, "Outsized earning surprises and the  
15 direction of the conspirators' trades," I mean, that is  
16 fundamentally keyed to what the Supreme Court held lawful in  
17 *Giarella*, which is that you might be able to predict that based  
18 upon really diligent work, especially if that's your job at  
19 M-13.

09:59 20 Now, they're going to say that's for trial, and that's  
21 an argument, but the threshold determination under 401, after  
22 *Daubert*, is whether that correlation is sufficiently relevant  
23 to go before a jury in the first instance.

24 MR. FRANK: That's not a *Daubert* --

25 MR. FERNICH: It is because you have to hear the

1 experts' competing visions of whether it's a relevant  
2 correlation or not, and the Court has to make a threshold  
3 determination.

4 THE COURT: All right. Well, I'll hear you on the  
5 18th on that on the *Daubert* hearing. We will not be addressing  
6 the issue of where the servers were, assuming that the invoices  
7 are the way that you've just described. That strikes me as a  
8 more traditional method and --

9 MR. KOSTO: Your Honor, *Giarella* and sophistication in  
10:00 10 trading is a terrific defense to an accusation of insider  
11 trading. The government's explanation of the evidence would be  
12 insider trading, but these are not *Daubert* or statistical  
13 issues. The statistical issue at play here is just that  
14 there's a relationship. They have an explanation; we have an  
15 explanation.

16 MR. FERNICH: I think that's a legitimate argument  
17 that they can make, but as in the first instance, the Court has  
18 to make a determination, particularly with respect to  
19 Parenthetical 1 in Footnote 8, as to whether this is  
10:00 20 conceptually a valid correlation for an expert to make under  
21 Rule 401; and I'm arguing that it's not because it's too close  
22 to the line of what is a legitimate informational advantage,  
23 and that is the essence of what the Court does under *Daubert*.

24 MR. FRANK: Those are two -- that's apples and  
25 oranges, Judge.

1 THE COURT: All right, all right, thank you. I'll  
2 handle this on the 18th. We've accomplished a lot today.  
3 We'll have two witnesses there, as far as I'm concerned. I  
4 also have to just sort of figure out how to do the impanelment,  
5 and I'll do that on the 18th in terms of any questionnaire.  
6 And I will not have only vaccinated, but I will ask that  
7 question. And I think that's it for right now.

8 (Discussion between the Court and Clerk.)

9 THE COURT: Are you available on the 18th, sir?

10:01 10 THE INTERPRETER: Yes, ma'am.

11 THE COURT: Thank you very much. And is it the woman  
12 or a guy from New York able to come up for the trial?

13 THE INTERPRETER: For the 30th? Yes, but not for the  
14 18th.

15 THE COURT: Can you do the 18th by yourself? I think  
16 it's only going to be a couple of hours.

17 THE INTERPRETER: Frankly speaking, it's a little bit  
18 difficult, your Honor, because it's a real technical --

19 THE COURT: Let's see if we can get in another  
10:02 20 interpreter, and if we can't, I'll just take breaks, okay?

21 THE INTERPRETER: Thank you.

22 MR. FRANK: Can I just inquire, your Honor, how you  
23 envision it going on the 18th in terms of --

24 THE COURT: Mr. Clarke takes the stand, Mr. --

25 MR. NEMTSEV: Nemtsev?

1 THE COURT: No, no, no.

2 MR. NEMTSEV: Mr. Ed Culley.

3 THE COURT: Yes, takes the stand. I'll take it under  
4 advisement.

5 MR. FRANK: So you just envision us, you know, asking  
6 him sort of a narrow -- what do you want us to establish with  
7 him is what I'm asking?

8 THE COURT: A, he's qualified; B, it's a reliable  
9 methodology; and, C, the data that he's relying on is reliable,  
10:03 10 I mean, basically. And then with respect to the defense  
11 expert, he's qualified; it's not a reliable methodology, and  
12 even if it is, the dataset isn't reliable. I mean, it's a  
13 classic *Daubert*, *Kumho* --

14 Did either of you work for a big firm?

15 MR. FRANK: Yes, but not on *Daubert* issues, Judge.

16 THE COURT: Yeah, people look at me like I'm  
17 speaking -- it's standard in the civil side, but the Supreme  
18 Court -- I mean, it's quite clear it applies in the criminal as  
19 well.

10:03 20 MR. FRANK: Basically an abbreviated direct exam that  
21 looks at the reliability of the methodology and the data.

22 THE COURT: Yes. And usually what I have on the civil  
23 side is actually an expert report that does a lot of this, so  
24 that's why often it can be done on oral argument. But I really  
25 have sketchy statements other than lawyers' argument, non-

1 expert.

2 Now, one last thing is, you were going to give me a  
3 proffer on the conspiracy? I'm not sure I quite need it on  
4 Ermakov and Rumiantcev. It's really the unnamed ones.

5 MR. FRANK: So I spoke with our Appellate Unit about  
6 this. We don't think that a proffer is appropriate in this  
7 circumstance because this is not a *Petrozziello* issue. This is  
8 simply an issue --

9 THE COURT: Well, I was almost with you except are you  
10:04 10 putting in their WhatsApp and --

11 MR. FRANK: We are not putting in -- so the two  
12 individuals who are at issue here are Sladkov and Irzkov. We  
13 are not putting in their statements.

14 THE COURT: I thought you were putting in their  
15 emails.

16 MR. FRANK: Not their emails. We're simply putting in  
17 evidence, photographs, trading records. That's what we're  
18 putting in as evidence.

19 THE COURT: So if you're not putting in any statements  
10:04 20 or emails or WhatsApps, it may not be relevant; but if you are  
21 and you're using that as attributable to the conspiracy, that's  
22 the piece of it I'm the weakest on. I don't really --

23 MR. FRANK: We're not putting in any statements of  
24 those two individuals. We're not.

25 THE COURT: Either on email, either on social media

1 or --

2 MR. FRANK: We're putting in photographs.

3 THE COURT: What did you think they were putting in?  
4 You told me there were some things you thought they were  
5 putting in.

6 MR. NEMTSEV: They're putting in their iCloud  
7 information, your Honor.

8 MR. FRANK: "iCloud information" is a broad term.  
9 We're putting in photographs that were found in their iCloud.  
10:05 10 We're putting in records that were found. That's evidence.  
11 That's not a statement for 801(d)(2)(e) purposes for which a  
12 *Petrozziello* proffer would be appropriate. That's simply  
13 evidence of the crime. That we are putting in, but that's not  
14 the appropriate subject of a proffer. If they want to make a  
15 multiple conspiracy argument and suggest that there were  
16 multiple conspiracies, they're entitled to do that; and then a  
17 court may at the end of the trial decide or not decide to give  
18 a multiple conspiracy instruction to the jury, but that's not  
19 the appropriate subject --

10:05 20 THE COURT: I might give a multiple conspiracy  
21 instruction to the jury, but if he's not putting in  
22 statements -- I thought you were saying that he was putting in  
23 statements from the iCloud.

24 MR. FRANK: We are putting in statements of Ermakov  
25 and the defendant in conversation with one another and of the

1 defendant and Rumiantcev in conversation with one another.

2 THE COURT: Of course. That part is easy.

3 MR. FRANK: That part is easy, but we are not putting  
4 in statements of Sladkov or Irzak.

5 MR. FERNICH: Judge, to the extent they're going to  
6 seek to hold Mr. Klyushin liable under a *Pinkerton*-type  
7 theory --

8 THE COURT: I don't usually give a *Pinkerton*  
9 instruction.

10:06 10 MR. FERNICH: Okay, all right.

11 THE COURT: I haven't in 30 years.

12 MR. FERNICH: No. Who does?

13 THE COURT: If it's a jury with a trial judge, I don't  
14 tend to give them.

15 MR. FERNICH: Okay.

16 THE COURT: And I do give multiple conspiracy  
17 instructions. However, if they're not introducing any  
18 statements, I don't need to worry about this. I thought you  
19 had said from the iCloud there were going to be statements from  
10:06 20 these people, and if that's not the case -- and I'll take it  
21 email by email if you change your mind. But I hear what your  
22 proposition is saying. I had misunderstood. I thought  
23 Mr. Nemtsev said without objection that you're putting in  
24 statements from the iCloud accounts.

25 MR. FRANK: The iCloud accounts contain statements,

1 and they contain photographs, and they contain other things.  
2 We're not putting in the statements. We're just putting in  
3 records.

4 MR. NEMTSEV: And, your Honor, we don't have an  
5 exhibit list yet.

6 THE COURT: I understand.

7 MR. NEMTSEV: Our major concern is the fact that  
8 they're using things that are outside of the conspiracy period  
9 or outside of --

10:07 10 THE COURT: Yes, but they get to rely on the trading  
11 records.

12 MR. NEMTSEV: I know, our client's trading records  
13 make sense, but they're trying to put in pictures from Irzak  
14 and Sladkov that precede the first trade of our client by  
15 months, many months.

16 THE COURT: Months means nothing. Months? So,  
17 anyway, all right, so I think we've got a game plan here.

18 And one last thing. I don't want to say this on the  
19 public record, I don't know who's covering or not, but if in  
10:07 20 fact there are reasons why this case won't go forward on that  
21 day, I need to know because I'm pulling in a ton of people.

22 MR. FRANK: We have every expectation it is going  
23 forward, Judge.

24 MR. NEMTSEV: As do we, your Honor.

25 THE COURT: Okay, thank you. We'll stand in recess.

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MR. FRANK: Thank you, your Honor.

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MR. FERNICH: Thank you, your Honor.

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(Adjourned, 10:08 a.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 44 inclusive, was recorded by me stenographically at  
the time and place aforesaid in Criminal No. 21-10104-PBS,  
United States of America v. Vladislav Klyushin, and thereafter  
by me reduced to typewriting and is a true and accurate record  
of the proceedings.

Dated this 14th day of January, 2023.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, CRR  
OFFICIAL COURT REPORTER